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SERVICE DATE - SEPTEMBER 28, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34486

OHIO VALLEY RAILROAD COMPANY
– ACQUISITION AND OPERATION EXEMPTION –
HARWOOD PROPERTIES, INC.

Decided: September 24, 2004

Ohio Valley Railroad Company (OVR) has filed a notice of exemption to acquire and operate certain trackage in Evansville, IN. Indiana Southwestern Railway Co. (ISW) requests that we reject the notice or revoke the exemption, or, in the alternative, that we stay the effective date of the exemption. For the reasons set forth below, we will deny ISW's petition to reject or revoke, and will dismiss as moot ISW's request for a stay.

BACKGROUND

By verified notice filed on March 23, 2004, and served and published in the Federal Register on April 22, 2004 (69 FR 21899), OVR, a noncarrier, invoked the Board's class exemption procedures under 49 CFR part 1150 subpart D to acquire by lease from Harwood Properties, Inc. (also a noncarrier), and operate as a common carrier approximately 2.8 miles of what appears to have been switching, industrial, or private track in the former Harwood Yard in Evansville, IN. The track that OVR would operate pursuant to the notice connects with lines operated by ISW. Under the terms of the class exemption procedures, the exemption became effective on March 30, 2004. In its notice, OVR stated that it anticipated that it would begin common carrier operations on or after March 30.

By letter filed on March 26, 2004, CSX Transportation, Inc. (CSXT), while stating that it takes no position in the proceeding, requests that we review OVR's proposal carefully to determine whether OVR will actually operate as a common carrier subject to our jurisdiction by virtue of the proposed transaction, or whether it merely will be a private switching company providing non-common carrier service. OVR responded to CSXT's submission on April 6, 2004. In its response, OVR disputes CSXT's suggestion that OVR might not become a common carrier, and confirms its intention to provide common carrier service over the subject trackage.

On April 15, 2004, ISW filed a petition to reject the notice or revoke OVR's exemption, or to stay the effectiveness of the exemption. ISW argues that OVR's notice of exemption is defective and misleading and that it is therefore void ab initio. Although it concedes that the class exemption procedures should be available in some instances where the transferor of the trackage is a noncarrier, ISW argues that we should restrict the use of the class exemption in

those cases. Specifically, ISW maintains that, when the effect of the transaction would be to change the legal status of the trackage and operations conducted on it, the notice filer must provide supporting evidence or argument to demonstrate with specificity that the class exemption should apply. Here, according to ISW, there is insufficient evidence to support a change in the legal status of the line.

In support of its petition to reject/revoke, ISW chiefly relies upon three Board decisions – Jefferson Terminal Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33950 (STB served Mar. 19, 2001) (Jefferson Terminal); Riverview Trenton Railroad Company – Acquisition and Operation Exemption – Crown Enterprises, Inc., STB Finance Docket No. 33980 (STB served Feb. 15, 2002) (Riverview Trenton); and Union Pacific Railroad Company – Operation Exemption – In Yolo County, CA, STB Finance Docket No. 34252 (STB served Dec. 5, 2002) (Yolo County) – in which the agency rejected the notice (Yolo County) or revoked the exemptions (Jefferson Terminal and Riverview Trenton) for the commencement of common carrier operations over trackage not previously subject to the licensing requirements of 49 U.S.C. 10901-10903. Relying on these cases, ISW argues that, before we permit OVR to invoke the class exemption to cover trackage over which we otherwise would lack licensing authority, OVR should be required to explain: (1) why it must or should become a common carrier subject to the Board’s licensing authority, and (2) how its proposed operations over the subject trackage would be distinguishable from private operations or switching operations that are excepted under 49 U.S.C. 10906 from our licensing authority under 49 U.S.C. 10901-10903.

In addition, citing the four-part standard set forth in Board decisions such as Bulkmatic Railroad Corporation – Acquisition and Operation Exemption – Bulkmatic Transport Company, STB Finance Docket No. 34145 (STB served Mar. 5, 2002), ISW argues that a stay of the effective date of the exemption is warranted. According to ISW, during the stay period, we should establish a procedural schedule for the proceeding to permit the agency’s further review of the matter.

On May 4, 2004, OVR replied to ISW’s petition. OVR reasserts its intention to provide common carrier service over the trackage, maintains that it is able to provide such service, and argues that ISW has not supplied any basis for the relief it seeks. OVR states that its notice is complete and not misleading, that its proposed operations will encompass more than just private or industrial switching, and that it will serve any shipper requesting service. OVR also argues that Jefferson Terminal, Riverview Trenton, and Yolo County are distinguishable from the transaction it proposes because, unlike all three of those cases, there is no suggestion here that OVR’s use of the Board’s class exemption process would frustrate the legitimate operation of state or local law.

DISCUSSION AND CONCLUSIONS

Under the licensing provisions of 49 U.S.C. 10901, a noncarrier (such as OVR) may file an application to acquire and operate a rail line. For an application to be granted, the proposed transaction must be found not to be inconsistent with the “public convenience and necessity.” Under 49 U.S.C. 10502 and 49 CFR 1121, however, a party may file a petition for an exemption from the formal application procedures of section 10901 on the grounds that: (1) full regulatory scrutiny is not necessary to carry out the rail transportation policy, and (2) either the exemption is limited in scope or regulation is not needed to protect shippers from an abuse of market power.

There are some situations in which approval would be so routine and noncontroversial that there is an expedited “class exemption” procedure allowing parties to obtain Board authorization subject only to an after-the-fact Board review if objections are received. Thus, under 49 CFR part 1150 subpart D, a noncarrier, under certain circumstances, can obtain authority to acquire and operate a line of railroad within 7 days. That authority can be revoked later under 49 U.S.C. 10502(d) should such action be necessary to carry out the transportation policy of 49 U.S.C. 10101. Alternatively, the exemption notice may be treated as void ab initio and rejected if it contains false or misleading information. See Class Exemption — Acq. & Oper. of R. Lines Under 49 U.S.C. 10901, 1 I.C.C.2d 810, 812 (1985), aff’d sub nom. Illinois Commerce Comm’n v. ICC, 817 F.2d 145 (D.C. Cir. 1987). Moreover, the Board has held that the informal, streamlined class exemption process is unsuited for cases in which the record reveals that a more searching review of the proposed transaction would be appropriate. See, e.g., James Riffin d/b/a The Northern Central Railroad – Acquisition and Operation Exemption – In York County, PA, and Baltimore County, MD, STB Finance Docket No. 34484 (STB served Apr. 20, 2004); Riverview Trenton.

ISW challenges OVR’s use of the class exemption procedures here because it claims OVR has not shown that its operations over the track require Board authorization. But, ISW has failed to demonstrate that OVR’s notice is either incomplete or inaccurate, and there is no evidence that the information it contains is false or misleading. In addition, ISW’s argument that we should read additional requirements into the class exemption process for cases such as this one is unavailing. Our regulations do not require that the notice filer explain why it has chosen to seek Board permission to engage in a particular transaction. ISW questions whether OVR will operate as a common carrier. But the record reflects that OVR intends to function, and to hold itself out to the public, as a common carrier over that trackage, and there is no evidence showing that OVR could not fulfill the common carrier duties that it would assume pursuant to the transaction.

Moreover, although the Harwood Yard trackage previously may have been used by another carrier either as switching/industrial track excepted from our licensing authority or private track entirely beyond our jurisdiction, that same trackage will now constitute OVR’s entire line of railroad over which OVR will hold itself out to the public as a common carrier.

Thus, the legal status of the subject track can change and has changed. See Effingham Railroad Company – Petition for Declaratory Order – Construction at Effingham, IL, 2 S.T.B. 606 (1997), aff’d sub nom. United Transp. Union v. STB, 183 F.3d 606, 613 (7th Cir. 1999); Yolo County. OVR therefore required Board authorization to commence common carrier operations and properly sought that authorization here.

ISW’s reliance on Jefferson Terminal, Riverview Trenton, and Yolo County as support for its petition to reject or revoke is misplaced. Those three cases involved circumstances that differ substantially from those present here, and thus they do not mandate the relief sought by ISW. Specifically, in Jefferson Terminal and Riverview Trenton, the communities affected by the proposed transactions argued that the applicants were invoking the class exemption procedures to obtain Board authority in order to trigger federal preemption and to defeat ongoing or anticipated condemnation proceedings involving the properties in question. In both cases, the Board concluded that, in light of the parties’ concerns that the applicant might be using the Board’s expedited licensing procedures to thwart local objectives to use the property for other purposes, a more searching review of the proposed transaction was warranted than could be undertaken under the class exemption process.

In Yolo County, the Board rejected a railroad’s notice of exemption that effectively would have converted that carrier’s switching operations over port-owned facilities to common carrier operations. In rejecting the notice, the Board observed that the incumbent railroad had “filed its notice of exemption in an attempt to avoid being forced to discontinue its operations over [the port’s] trackage” pursuant to a private agreement between the port and another railroad that would replace the incumbent as the exclusive operator of the trackage. Id. at 1-2. Noting that the incumbent railroad’s notice of exemption did not envision any change in operators or its own operations over the port’s trackage, the Board stated that the incumbent railroad appeared to be using the agency’s procedures not to facilitate changes in the railroad’s service or its relationship to shippers located on the port-owned trackage, but, rather, merely to “frustrate the terms of a private contract” between the port and another railroad. Id. at 5.

Here, unlike in the cases it cites, ISW has not provided any evidence or expressed any specific concerns indicating that the purpose of this transaction is an improper one or that a more searching review is necessary. Furthermore, ISW does not demonstrate that OVR’s activities could only be regarded as switching operations under 49 U.S.C. 10906 or unregulated private track operations. Because ISW has not shown that OVR’s notice of exemption is defective, misleading, or inadequate, has provided no evidence to indicate a possible abuse of our processes, and has not otherwise demonstrated a need for regulatory scrutiny, we will deny ISW’s petition to reject or revoke.

In light of our decision denying ISW’s petition, we will dismiss as moot ISW’s request for a stay.

This decision will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. ISW's petition to reject the notice or revoke the exemption is denied.
2. ISW's petition for stay is dismissed as moot.
3. This decision is effective on its date of service.

By the Board, Chairman Nober, Vice Chairman Mulvey, and Commissioner Buttrey.

Vernon A. Williams
Secretary